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	AGENCY NAME & ADDRESS	Department of Law		
	SUBJECT	Public Disclosure of Personnel Information		

TO James L. Shea
City Solicitor

DATE: October 21, 2021

Question:

You have asked whether the Office of the Inspector General Advisory Board can conduct a public meeting to discuss the Inspector General's performance review.

Brief Answer:

No. The Open Meetings Act does not shield the Advisory Board from other laws prohibiting disclosure of sensitive personnel materials. The Maryland Public Information Act ("PIA") makes it a crime to knowingly and willfully violate that Act. Md. Code, Gen. Prov., § 4-402. The PIA requires government custodians to deny inspection of personnel records, specifically including performance reviews. Md. Code, Gen. Prov., § 4-311. The Maryland Attorney General has opined that this exemption means that a government must "prevent unauthorized disclosure of the contents of a personnel file." 65 Md. Op. Atty. Gen. 365 (1980). Discussing the contents of the personnel file in public would constitute dissemination in violation of the PIA.

Analysis:

The Open Meetings Act

The Open Meetings Act is a Maryland law that requires public bodies to hold their meetings in public. Md. Code, Gen. Prov., § 3-102(c). However, the Open Meetings Act makes an exception for public bodies to meet in closed session to discuss certain types of meetings, including the "performance evaluation of an appointee, employee, or official over whom it has jurisdiction." Md. Code, Gen. Prov., § 3-305(b)(1)(i). The Open Meetings Act Compliance Board has upheld this provision to permit bodies to meet in closed session when evaluating the performance of other employees. *See, e.g.*, 12 OMCB 46, 48 (2018) ("board is permitted to discuss a superintendent's contract and performance in closed session pursuant to the personnel exception in § 3-305(b)(1)").

The Open Meetings Act also directs that discussions may be held in closed session to "comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter." Md. Code, Gen. Prov., § 3-305(b)(13). The Open Meetings Act Compliance Board has explicitly pointed to the PIA as a reason to meet in closed session. *See, e.g.*, 12 OMCB 93, 96 (2018) (PIA can be other law that is the source of the reason to close under the Open Meetings Act).

The Maryland Public Information Act

The Maryland Public Information Act prohibits any disclosure of certain personnel information. PIA Section 4-311(a) provides that “[s]ubject to subsection (b) of this section, a custodian shall deny inspection of a personnel record of an individual, including an application, a performance rating, or scholastic achievement information.” Md. Code, Gen. Prov., § 4-311(a). Subsection (b) authorizes disclosure to the employee herself, any “elected or appointed official who supervises the work of the individual” or part of the record to certain educational employee unions, where applicable. Md. Code, Gen. Prov., § 4-311(b).

A performance review is an enumerated type of personnel record that may not be inspected under PIA Section 4-311. Md. Code, Gen. Prov., § 4-311(a). However, Maryland Courts have held that the definition of a “personnel record” extends beyond merely the official performance review and the other items expressly listed in the PIA because “this list was probably not intended to be exhaustive,” but rather “it does reflect a legislative intent that ‘personnel records’ mean those documents that directly pertain to employment and an employee’s ability to perform a job.” *Kirwan v. Diamondback*, 352 Md. 74, 83 (1998).¹ A record is a personnel record based on its content, not its location in an human resources or personnel file. *Lamson v. Montgomery County*, 460 Md. 349, 365 (2018) (“the mere physical location of a record is not necessarily dispositive of its characterization”).

While the language of PIA Section 4-311(a) provides that the government must deny “inspection” of a personnel record, the Maryland Attorney General (“AG”) has explained that a violation of that section will occur if the contents of such a record are disseminated publicly. 65 Md. Op. Atty. Gen. 365 (1980). In 1980, the AG was addressing the allegation that former Baltimore City Comptroller Hyman Pressman “disseminated information contained in [another City employee’s personnel] file to members of the press present at the time,” and opined that while it was unclear whether the Comptroller was someone who supervised the employee, it was clear that he was a physical custodian of the file and that any “custodian, was obligated to ‘deny the . . . inspection of . . . [p]ersonnel files’ by unauthorized persons—that is, to prevent unauthorized disclosure of the contents of a personnel file in his possession.” *Id.* There was no indication that the Comptroller actually released a document, but instead publicly disclosed its contents.

The AG’s Opinion makes clear that publicly discussing the contents of a personnel document is a violation of the PIA exemption because “the obvious purpose of this section is to preserve the privacy of personal information about a public employee that is accumulated during his or her employment.” *Id.* “A person, including an officer or employee of a governmental unit, is liable to an individual for actual damages” if a Court finds by clear and convincing evidence that he “willfully and knowingly allows inspection or use of a public record” that identifies a person in violation of the PIA. Md. Code, Gen. Prov., § 4-401. Additionally, a “person may not willfully or knowingly violate any provision” of the PIA and any “person who violates any provision of

¹ The PIA was recently amended to exclude “a record relating to an administrative or criminal investigation of misconduct by a police officer, including an internal affairs investigatory record, a hearing record, and records relating to a disciplinary decision” but not any records of technical infractions. Md. Code, Gen. Prov., § 4-311(c) (enacted by 2021 Md. Laws ch. 62).

this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$1,000.” Md. Code, Gen. Prov., § 4-402.

An employee who consents to disclosure of his or her personnel record likely would not bring a lawsuit seeking the civil damages that are available under PIA Section 4-401. However, no one can waive the criminal prosecution to which a person would be subject for violating state law. *See, e.g., Lopez-Sanchez v. State*, 388 Md. 214, 226 (2005), superseded by statute on other grounds by *Holie v. State*², 404 Md. 591, 605 (2008), (“A criminal act is an offense against the sovereign, a wrong injurious not only to the victim but to the public at large, and, as such, is brought in the name of the State of Maryland.”).

Baltimore City Charter

The Baltimore City Charter was amended in 2018 to create an Office of the Inspector General and an Advisory Board charged with meeting “at least once annually to review the performance of the Inspector General.” Charter Art. X, § 2(f). While the Baltimore City Charter provides that the OIG Advisory Board must meet at least once a year to review the performance of the OIG, it does not, nor could it, mandate that the discussion be public in a way that would violate any state law, including the PIA. *Lamson*, 460 Md. at 364 (“a county charter is subordinate to the public general laws of Maryland.’ ... ‘[a] local government ordinance or charter that conflicts with a public general law enacted by the General Assembly is preempted and thus is invalid.” (citing *Police Patrol Sec. Sys., Inc. v. Prince George’s Cty.*, 378 Md. 702, 712 (2003)); accord 86 Op. Att’y Gen. 94, 106-07 (2001) (“a contrary interpretation ‘would allow...local entities at their election to undermine the [PIA]’”). Rather, the Charter would be interpreted in harmony with the existing state laws. *Criminal Injuries Compensation Bd. v. Gould*, 273 Md. 486, 498 (1975); *Mayor & City Council v. Bunting*, 168 Md. App. 134, 141 (2006) (“Charters are subject to the ‘same canons of statutory construction that apply to the interpretation of statutes.’”).

Conclusion:

Discussing the information contained in a government employee’s personnel record publicly would be allowing public inspection of that information in violation of PIA Section 4-311 and if a Court found that to be a knowing and willful violation PIA, the persons violating it would be guilty of a misdemeanor under PIA Section 4-401. This is true regardless of whether the employee subject of those records indicates that she would consent to disclosure and not seek civil damages under the PIA, because that would not effectuate a waiver of criminal liability nor could it prevent a prosecutor from seeking a conviction under PIA Section 4-402. In the specific case of the OIG Advisory Board, the Charter provision requiring a meeting at least annually to discuss the IG’s performance could not be interpreted to require a public discussion of the performance review as that would violate state law. Therefore, all government record

² Although recent state laws give victims a way to mandate that trial courts hear their impact statements before sentencing by allowing them to appeal criminal convictions on those grounds, thereby overruling the analysis that led to dismissal of such an appeal in *Lopez-Sanchez v. State*, the main premise that the prosecutor has sole discretion to prosecute regardless of victim’s desires remains the law and victims cannot determine whether a person is prosecuted. Md. Code, Crim. Pro., § 11-103 (enacted by 2006 Md. Laws ch, 206).

custodians, including the OIG Advisory Board, should be careful not to disseminate personnel information publicly.